No. 15,091

United States Court of Appeals

For the Ninth Circuit

PACIFIC-ATLANTIC STEAMSHIP COMPANY, a corporation,	*Appellant,*
vs.	
EMMA HUTCHISON, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased,	*Appellee.*

EXCERPTS FROM APPELLANT'S ORAL ARGUMENT, AND ADDITIONAL AUTHORITIES.

LASHER B. GALLAGHER,
351 California Street, San Francisco 4, California,
Attorney for Appellant.

No. 15,091

United States Court of Appeals
For the Ninth Circuit

Pacific-Atlantic Steamship Company, a corporation,	*Appellant,*
vs.	
Emma Hutchison, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased,	*Appellee.*

EXCERPTS FROM APPELLANT'S ORAL ARGUMENT, AND ADDITIONAL AUTHORITIES.

The verbatim reporter's transcript of the opening and closing oral arguments of appellant is part of the record in the custody of the Clerk. To obviate any waste of the Court's time, verbatim excerpts therefrom are set forth hereinafter, with appropriate reference to the page thereof. All definitions of words (in Article III, § 2, Constitution), in respect of their common meanings as of the *time* of their use (the *framing and ratification* of the Constitution), are quoted from the Oxford Dictionary, Unabridged. These are in italics, enclosed within brackets, following each such word. All other emphasis throughout is added.

1. ". . . the first point to which I desire to direct your Honors' attention is the question of jurisdiction in the trial court. That question has two facets to it which, as I understand the law, must be satisfied. This action was filed on the law side of the court. Therefore the court was required of its own motion to investigate the questions, whether it was vested with jurisdiction of the *parties,* and jurisdiction of the *subject matter.*" (Tr. p. 2.)

Authorities: "WE THE PEOPLE of the United States, . . . do ordain and establish this CONSTITUTION for the United States of America." (Preamble.) "All *legislative* Powers *herein* granted *shall* be vested in a *Congress* of the United States . . ." (Art. I, § 1.) "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes. . . . To *constitute* Tribunals *inferior* to the supreme Court. . . . To make all laws which shall be *necessary and proper* for *carrying* into *Execution* the *foregoing* Powers, and all other Powers *vested* by this *Constitution* in the Government of the United States, or in any Department or Officer thereof." (Art. I. § 8.) "The *judicial* Power of the United States, *shall be vested* in one supreme Court, and *in such inferior Courts as the Congress may from time to time ordain and establish.*" (Thus *all* judicial power of the United States, other than that *vested* by the Constitution "in one supreme Court", is by the same document *vested* (and *not* within the power of the Congress to *extend, diminish, modify* or *alter*) "in such *inferior* Courts" as it *does* ordain and establish. Its *sole* power, in respect of this judicial *Power,* is to *distribute* or *allocate* it.) (Art. III, §§ 1, 8) "The judicial Power shall extend [*To cover an area; to stretch out in various directions; to widen the range, scope, area of application of (a law, operation, dominion, state of things.*] to all [*The entire or unabated amount or quantitiy of; the*

whole] Cases, [*The state of facts judicially considered; a cause or suit brought into court for decision*] in Law and Equity, arising [*springing up, origination*] under [*by or included in another; in accordance with*] this Constitution, the Laws of the United States, . . .;—to all Cases of admiralty [*That branch of the administration of justice which deals with maritime questions and offenses.*] and maritime [*Connected with the sea in relation to navigation, commerce, etc.; relating to or dealing with matters of commerce or navigation on the sea*] Jurisdiction [*Administration of justice; exercise of judicial authority, or the functions of a judge or legal tribunal; legal authority or power*];—. . . to Controversies . . . between citizens of different States; . . ." (Art. III, § 2.)

"This Constitution, and the *Laws* of the United States which shall be *made* in *Pursuance* thereof [*not* the opinions of *any* court]; and all Treaties made, or which shall be made, under the Authority of the United States, *shall* be the *supreme Law of the Land;* and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Art. VI, second paragraph.) *But,* "The powers [*all* powers of *sovereignty,* vested *originally* in "The People of the United States of America", including *absolute and all inclusive* political, executive, *legislative* and *judicial* powers in respect of the *territorial and aquatic* domains of every free and independent state or political entity] not *delegated* to the United States *by* the Constitution, nor *prohibited* by *it* to the States, are *reserved* to the *States* respectively, or *to the people.*" (Amendment X.)

As to the fundamental and established rules governing "Constitutional Law" and the limit of the doctrine "Stare Decisis" in this field, please see: 11 American Jurisprudence, pp. 661-663; 667; 676-679; 680-682; 14 Ameri-

can Jurisprudence, p. 345; *Smith v. Allwright,* 321 U.S. 649, 664-666, 88 L.Ed. 987, 998.

As to the distinctions between, and limitations of, the *legislative* power of the Congress (its restriction to the regulation of interstate and foreign Commerce) and the *judicial* power vested in various federal courts, please see: *The Propeller Genesee Chief v. Fitzhugh,* 12 Howard, 443, 452-457, 13 L.Ed., 1058, 1062-1064; and *The Lottawanna,* 88 U.S. 640, 574-578, 22 L.Ed. 654, 662-663.

2. ". . . there is no averment of diversity of citizenship in the original Complaint which was filed on October 13, 1951, and there is no averment of diversity of citizenship in the amended Complaint upon which the action went to trial." (Tr. p. 2.) ". . . I contend, No. 1, in order to vest jurisdiction of the persons in the United States District Court, the Complaint must contain clear, concise, and direct averments in respect of the citizenship of both of the parties, and unless that averment is in the complaint, the District Court of the United States has no jurisdiction whatever in respect of the parties in any case where jurisdiction depends at all upon that particular proposition, to wit, diversity of citizenship." (Tr. p. 3.)

Authority: Article III, § 2, supra.

3. "The next point in respect of jurisdiction is this: . . . the last sentence of that part of the Jones Act which is contained within the four corners of Section 33 of the Merchant Marine Act of 1920 reads as follows:

> '*Jurisdiction* in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.' "

"Jurisdiction" in this sentence was held, by the Supreme Court, to mean "Venue". Authority: *Panama R.*

Co. v. Johnson, 264 U.S. 375, 384-385, 69 L. Ed. 748, 751-752. Comment: The Court said: "The case *arose* under a law of the United States and involved the requisite amount, if any was requisite;" (264 U.S. p. 383, 68 L.Ed. p. 751) but does not indicate that this was a *disputed* question of law submitted for *decision.* Cf. *Pacific S.S. Co. v. Peterson,* 278 U.S. 130, 136, 73 L.Ed. 220, 223.

4. "Now, the next sources of possible jurisdiction in the court below are found in the Statutes of the United States enacted by the Congress which follow the provisions of Article III, Section 2 of the Constitution of the United States." (Tr. p. 4.)

"Title 46 U. S. Code 1331:

> 'The district courts shall have original jurisdiction of all *civil actions* wherein the matter in controversy exceeds the sum or value of three thousand dollars, exclusive of interest and costs, and arises under the Constitution, Laws or Treaties of the United States.'

". . . the original [and amended] complaint[s] contain this allegation in Paragraph I:

> 'This action is maintained under the provisions of Section 33 of the Merchant Marine Act of 1920, commonly known as "The Jones Act" and all statutes amendatory and supplemental thereto.'

"There is no averment in the Complaint that this statute is a subject of construction by the court. In other words, there isn't any averment in this Complaint anywhere which satisfies the basic requirements of jurisdiction of the subject matter in the event it is sought to predicate that jurisdiction upon that particular section of the Judicial Code or upon the same language in the Constitution. And I will call the attention of your Honors to a few excerpts from cases." (Tr. p. 5.)

Authorities: *Little York etc. Co. v. Keyes,* 96 U.S. 199, 201-203, 24 L.Ed. 656, 658; *Shultis v. McDougall,* 225 U.S. 561, 569, 56 L.Ed. 1205, 1211; *Gully v. First National Bank,* 299 U.S. 109, 112-114, 81 L.Ed. 70, 72-73; *Bell v. Hood,* 327 U.S. 678, 685, 90 L.Ed. 939, 944.

> "When we consider the question from a wider aspect, we think all of the analogies point to the conclusion that federal jurisdiction does not exist in the case before us. It is not just because a right has its *origin* in federal law that a federal court has jurisdiction over matters which grow from that right . . .
>
> "There are many Supreme Court decisions which in a variety of situations point out that the jurisdiction of federal courts is not to be extended by implication from the fact that some right involved originated under United States law."
>
> *Republic Pictures Corp. v. Security-First Nat. Bank,* 197 F.2d 767, 769-770.

In *Van Camp Sea Food Co. v. Nordyke,* 140 F.2d 902, where the appellants' answer "*denied* that the plaintiff had any right to maintain the action under the provisions of the Jones Act" (140 F.2d at p. 904), this Court, evidently being of the opinion that there *was* a *controversy* in respect of the applicability of said "Law of the United States", held that diversity of citizenship was not essential to the jurisdiction of the District Court.

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between: (1) Citizens of different States . . ." (Title 28, U.S.C. § 1332.) [In cases where this section is applicable, either party may withdraw the same from the jurisdiction of state courts.]

5. "Now, the next possible source of jurisdiction is § 1333, Title 28, U.S.C.: 'The district courts shall have

original jurisdiction, *exclusive* of the courts of the States, of: (1) Any civil case of admiralty or maritime *jurisdiction,* saving to suitors in all cases all other *remedies* to which they are *otherwise* entitled.'

"Now, my contention in respect of that section is simply this: The plaintiff did not place any averments in her complaint pursuant to which she would show any dispute in respect of that statute or any necessity for any decision in respect of that statute. Therefore, the case does not involve a case arising under a law of the United States. . . . I contend that cases of *admiralty and maritime jurisdiction* as referred to in the Constitution are entirely *different and distinct* from, and were intended to be distinct from cases *in law and equity* whether they arose under the Constitution or laws of the Untied States, or otherwise.

"Now, if the appellee in this case contends that jurisdiction, irrespective of diversity, was vested in the District Court of the United States solely by reference to § 1333 of Title 28 [U.S.C.], then it is our contention that any such assertion is fruitless." (Tr. pp. 9-10.)

Authorities: A. Constitutional provisions, supra. B. "Cases of admiralty and maritime *Jurisdiction*" [The Constitution does not say that the federal courts shall have Jurisdiction of all admiralty and maritime *Cases.* It uses the phrase "all Cases of admiralty and maritime *Jurisdiction*"]. As of the time of the framing and ratification of the Constitution, "Cases of admiralty and maritime *Jurisdiction*" as known and understood by the persons domiciled in the British Colonies for approximately 100 years up to the time of the Declaration of Independence, July 4, 1776, and thereafter until the ratification of the Constitution of the United States, were those based upon *substantive* admiralty and maritime *rights of ac-*

tion. There was no admiralty or maritime "trial by jury" *remedy.* The mode of trial was that of the "civil law"; and the [judicial power] jurisdiction, in respect of *all* [in rem *and* in personam] such Cases was vested *exclusively* in the Admiralty *Court* [the judge]. (Benedict on Admiralty, Sixth Edition, Vol. IV, p. 397, § 699; pp. 398-401, §§ 700-704; pp. 405-537, §§ 707-718; pp. 438-442, §§ 719, 725; pp. 443-449, §§ 726-733, pp. 450-456, § 734.) Pursuant to this incontrovertible *historical* authority, no action maintained under the Jones Act is a Case "of admiralty and maritime Jurisdiction" as those words are used, in their *context,* in the Constitution (supra).

"Therefore, we get down to the meat in the cocoanut, and we contend that Jurisdiction, if it be vested at all, would have to be predicated upon diversity of citizenship on the law side of the court, and that the complaint would have to aver the other things which we have alluded to in the first part of our brief in respect of a common carrier engaging in interstate or foreign commerce, and that this man was injured while employed in such commerce, and so forth, because the jurisdiction of all courts of the United States is exclusively statutory; and I use that in a broad sense intending to include the Constitution of the United States as a statute, which I think it is. So that everything must stem from there. Congress has *no* power excepting as it is vested in the Congress *by* the Constitution, and the courts of the United States have *no* jurisdiction excepting as it stems from the Constitution and laws which are in themselves *constitutional* as enacted by the Congress of the United States." (Tr. pp. 10-11.) *Ex parte Richard Quirin,* 317 U.S. 1, 25-26, 87 L.Ed. 3, 11; *U. S. v. Butler,* 297 U.S. 1, 62-63, 80 L.Ed. 477, 486-487; *Calder v. Bull,* 3 Dall. 386, 387-388, 1 L.Ed. 648, 649; and *Youngstown etc. Co. v. Sawyer,* 193 F. Supp. 569, 197 F.

2d 582, 343 U.S. 579, 585-589, 96 L.Ed 1153, 1166-1168, 26 A.L.R. 2d 1378.

6. "The appellant contends that there are well-defined and thoroughly established statements of the principles of law involved in the relationship of master and servant, or as we refer to it nowadays, employer and employee; and also in respect of what constitutes or is the meaning of the common-law phrase, 'in the course of his employment', the common-law phrase, 'common carrier', the common-law phrase, 'employed in such commerce by such carrier', the word, 'negligence', the words 'contributory negligence', the words, 'assumption of risk', and the fellow-servant doctrine."

Authorities: "In the course of [the] employment": *McDonough, Admr. v. Buckeye S.S. Co.,* 103 F.Supp. 473, 200 F.2d 558, Cert.Den., 345 U.S. 926, 97 L.Ed. 1557; Restatement of Agency, Sections 228 and 229 (cited as authority in *McDonough, Admr. v. Buckeye S.S. Co.,* supra), provide as follows:

"(1) Conduct of a servant is within the scope of employment if, but *only* if:

"(a) it is of *the* kind he is employed to perform, as stated in § 229;

"(b) it occurs substantially within the *authorized* time and *space* limits, as stated in §§ 233-234; *and*

"(c) it is actuated, *at least in part,* by a purpose to serve the master, as stated in §§ 235-236. [These *three* elements must exist *concurrently*]

"(2) It is a question of fact, depending upon the extent of departure, whether or not an act, as performed in its setting of time and place, is so different in kind from that authorized, or has so little relation to the employment,

that it is not within its scope." (Restatement of the Law, Agency, § 228, p. 505.)

"Kind of Conduct Within Scope of Employment.

"(1) To be within the scope of the employment, conduct must be of the *same general nature* as that *authorized,* or incidental to the *conduct* authorized.

"(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:

"(a) whether or not the act is one *commonly* done by *such* servants;

"(b) the *time, place* and *purpose* of the act;

"(c) the *previous* relations between the master and *the* servant;

"(d) the *extent* to which the business of the master is *apportioned* between *different* servants;

"(e) whether the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

"(f) whether or not the master has reason to expect that *such* an act will be done;

"(g) the *similarity* in quality of the act done to *the act* authorized;

"(h) whether or *not* the instrumentality by which the harm is done has been *furnished* by the master to *the* servant;

"(i) the extent of departure from the normal method of accomplishing an authorized result; and

"(j) whether or not the act is seriously criminal."

(Restatement of the Law, Agency, § 229, pp. 507-508.)

"In creating and maintaining the conditions of employment, the master has a duty to his servants to have precautions taken which *reasonable* care, intelligence, and regard for the safety of his servants require." (Restatement of the Law, Agency, § 493, pp. 1152-1153.)

"Time When and Place Where Duty Exists.

"The duty of the master to a servant to furnish *reasonably* safe conditions exists *only* while the servant is *properly* acting within the scope of his employment or while, in connection therewith, he is *in a place or vehicle* in the control of the master in which he is then *required* to be by reason of *his* employment or which has been *provided for use* incidental to *his* employment." (Restatement of the Law, Agency, § 497, p. 1161.)

With respect to this last section, appellant quotes Comment "b" as follows:

"b. *When servant is on premises.* The master's duty of protection includes the safeguarding of the servant in *places* upon the master's *premises,* or premises under the master's control, in which the servant is *required* to be, not only during his employment, but also in going to and from it, both at the beginning of the employment and at its termination. Likewise, it includes *such* a duty while the servant is doing a *necessary* act for his own comfort or convenience during the period of employment, or is inactive, *provided* that *the* conduct is *permitted* by the *terms of the employment.* The fact that the servant is momentarily not working is immaterial." (Restatement of the Law, Agency, § 497, Comment: b., p. 1162.)

"Comment:

"d. *Servant not in scope of employment.* When the servant is upon the land or vehicle of the master *not* in

connection with his employment, *whether or not* at a time when he is required to be there by reason of it, the liability of the master to him is the same as that of any possessor of land or operator of a vehicle to a third person. If the servant is acting so *improperly* that he loses the privilege of a servant to be upon his master's premises or, if he is *otherwise* there without *privilege,* the master is liable to him for the *condition* of the premises or vehicle or for the *conduct* of his other servants only as he is to a trespasser. On the other hand, if the servant is upon the land or vehicle as a *business visitor* or *gratuitous licensee,* the master is liable to him as to other visitors or licensees. * * *." (Restatement of the Law, Agency, § 497, Comment: d., p. 1164.

Contrary to the holding of the Supreme Court [in respect of the *essential* averments of a complaint] in *Brown v. Western Ry. of Alabama,* 338 U.S. 294, 297-298, 100 L. Ed. 100, 103; and of *this* Court, in reference to other elements, in *Valeski v. Pac. Atl. S.S. Co.,* 166 F. 2d 553, the case of *Ford v. United Fruit Co.,* 171 F. 2d 641, and foregoing *accurate and complete* statement of common-law rules; and the cases of *Philadelphia etc. Co. v. Passinier,* 9 F. 2d 854, 856; *Philadelphia etc. Co. v. Thirouin,* 9 F. 2d 856, 858; *Philadelphia etc. Co. v. Bartsch,* 9 F. 2d 858, 860-861; the California District Court of Appeal, in *Anderson v. Chamberlin,* 142 C.A. 2d 591 (298 P. 2d 901), at p. 610, states as follows:

"In construing 'course of employment' the courts do not, as contended by respondent, confine it to the performance of assigned duties at a 'required' place, but on the contrary, the holding is that a seaman 'is considered to be *in the course of his employment* if engaged in *any* matter *incidental* to his required duties' (*Sundberg v. Washington Fish & Oyster Co., supra,* p. 803). For the

purpose involved in the case at bar, a seaman is at his place of work when he is at a place on or off the ship for '*a* purpose *connected* with his employment' by the shipowner (*States S. S. Co. v. Berglann,* 41 F.2d 456, 457). The *test* as to whether the seaman was acting in the course of his employment would seem to be whether at the time in question he is acting '*in the vessel's interest*' (*Wong Bar v. Suburban Petroleum Transport,* 119 F.2d 745, 746; *Nowery v. Smith,* 69 F.Supp. 755, affirmed 161 F. 2d 732; *Pedersen v. United States,* 122 F.Supp. 614, 618, affirmed 224 F.2d 212).

"Involved in determining whether appellant was acting in the course of his employment *two* (sic) questions are presented, (1) what was he doing at the time of his injury, and (2) the location, away from his regular work place, of the spot where the injury occurred. From an examination of the cases we are satisfied that the evidence in the case at bar, under proper instructions would support a finding that appellant was within the course of his employment. It is respondent's contention that appellant herein cannot recover because his injury was the result of his being at a place where he was not required to be in the performance of his duties as a chief-steward, but the *weight* of authority would seem to be that a seaman is entitled to recover so long as he was *not* at *a* [*regardless of where it may have been anywhere on the ship*] place on the vessel where he was *forbidden to be.* The tenor of the foregoing instructions given in the case now under consideration is that appellant cannot recover unless he was 'required' to be at the place where he was injured. Our view of the law is that though the seaman leaves the place where he performs his primary tasks, if injured, he may recover if he left such a place to do *something* connected with and in aid of the task assigned to him."

The "forbidden to be" part is based upon a broad statement in *Alden v. U. S. etc., Corp.*, 24 F.2d 159, 160. In its context, it is clear that the Court was using the phrase "forbidden to be" as synonymous with the preceding language "as the evidence did not show that it was not *permissible* for the appellant to be in the engine room before going to the pumproom after the required lights were furnished." The actual testimony of Alden is set forth in the Appendix.

7. "The Jones Act has *two* segments to it. No. 1, it provides for a right of action for personal injury by a living seaman. But that Act and actions truly under it are not governed, I respectfully submit, by the substantive admiralty and maritime law, for the simple reason—and this is something which I don't believe has ever been decided by any court; it has never been submitted to any court as a disputed question of law. The appellant is so submitting these questions in respect of the proper construction of this statute as disputed questions of law. The first disputed question of law is this: This Jones Act—when I say 'Jones Act,' I mean only the words you can find in Section 33 of the Merchant Marine Act—says that 'in any action for personal injury maintained by a seaman, all statutes of the United States modifying or extending the *common law right or remedy* in cases of personal injury to *railway* employees shall apply.'

"Now, the Congress didn't say that in these actions the general admiralty and maritime law shall apply. It said, the common law as modified or extended by the Congress in the Federal Employers Liability Act. Therefore, if there is any conflict between some basic principle of the so-called general admiralty and maritime law and the modified or extended common law pursuant to the statutes enacted by the Congress of the United States in respect of railway employees, then I respectfully contend that the

statute controls, and that therefore, the rules of law, the substantive and basic rules of law applicable even in an action by a seaman for personal injuries, is the common law of England as recognized by the courts of the United States, excepting to the extent that it has been modified or extended by the Congress; or, to express it in another way, the common law, as modified and extended, is still a part of the common law. It may be more; it may be less. But it is still a part of the common law. Therefore, in these actions the basic substantive law which is applicable is the common law as modified and extended by the statutes. The Congress didn't say a single word in this Jones Act about admiralty, didn't even mention the word. It says nothing about maritime. It says nothing about admiralty and maritime jurisdiction. Of course, Congress knew that those things were in the Constitution of the United States, and they deliberately left them out. At least we have got to assume, I think, that Congress was composed of men who were competent and who knew what they were doing and intended to do what they did and accomplished it. In any event, the language is clear and unambiguous, and I contend that nobody can take that statute and find any ambiguity in it. The only possible room for construction is the following: What statutes of the United States modify or extend the theretofore existing common law right or remedy in cases of personal injury to railway employees, and to what extent did those statutes modify or extend the theretofore existing common law right or remedy? Of course, we know right away [that] the old common law was modified in certain respects, and I am not going to burden your Honors with a dissertation of what I think will constitute all of the modifications. I will just mention a couple. For example, the fellow servant defense was swept out from under the feet of the employers of these railroad men who were employed by common carriers engaging in interstate commerce. Con-

tributory negligence ceased to exist as a complete defense, but became only a partial defense to the extent to which the negligence of the railway employee proximately contributed to his own total damage." (Tr., pp. 11-14.)

Authorities: *Johnson v. U. S.,* 333 U.S. 46, 49, 92 L.Ed. 468, 472; *DeZon v. A. P. L.,* 318 U.S. 660, 665, 87 L.Ed. 1065, 1069; *Chesapeake, etc. Co. v. Kuhn,* 284 U.S. 44, 46-47, 76 L. Ed. 156, 160; *Bailey v. Central Vt. Co.,* 319 U.S. 350, 352-353, 87 L.Ed. 1444, 1447; *Roberts v. United Fisheries Vessels,* 141 F.2d 288; *Pietryzk v. Dollar Steamship Lines,* 31 C.A.2d 584, 592-593; and Title 45 U.S.C. §§ 51-56, with the *exception* of that part of the last mentioned section which provides as follows: "The *jurisdiction* of the courts of the United States under this chapter shall be *concurrent* with that of the courts of the several States." This abortive attempt to vest jurisdiction in the courts of the several States is unconstitutional, being in clear contravention of Article I, Section 8, Article III, Sections 1 and 2; and Amendment X. On the other hand, in spite of what the Supreme Court of the United States said in respect of the intent of the Congress, in using the word "jurisdiction" in the last sentence of the Jones Act, Section 56, Title 45, U.S.C., demonstrates that the Congress knew and recognized the distinction between venue and jurisdiction. The first sentence of the second paragraph of said Section 56 is relevant solely to the question of venue. The second sentence of said paragraph purports to deal with "jurisdiction". Therefore, it may be reasonably argued that "jurisdiction" as used in the Jones Act meant, and was intended by the Congress to mean "judicial power". This point in respect of said Section 56, has never been submitted to or decided by the Supreme Court of the United States as a disputed question of law, either under the Federal Employers' Liability Act or the Jones Act.

8. "With reference to actions of negligence under the common law, in actions involving master and servant, I contend on behalf of the appellant here that the [*substantive*] law and all of the law which is or can be applicable to any case, whether it involves a railroad man or a seaman, in respect of the duty of the employer as to the place of work is set forth in 56 Corpus Juris Secundum, Section 219, Subdivision B, pages 931 to 932. I also want to call your Honors' attention to a subject which is quite important in our case from the factual standpoint, to wit, this question of artificial illumination in mast house No. 2 on April 24, 1951 when they claim this man in some way got into this ventilator shaft. In that respect I respectfully call your Honors' attention to 56 Corpus Juris Secundum, Section 219, Subdivision C, commencing on page 932, the headnote reading, 'The duty to furnish a safe place of work includes the duty of furnishing sufficient light when *necessary.*' And right there, if your Honors please, is an example of something I refer to in my brief. We can all find hundreds of cases where courts, high courts, have said, 'It is the duty of the employer to furnish a safe place to work', period. That is not the duty at all, and no court has ever said so when it was submitted to it as a disputed question of law." (Tr. pp. 15-16.)

Authorities: "While *ordinarily* the duty of the employer to furnish employees a *reasonably* safe place to work is limited to the premises where the employees are *required* to be for the purposes of their employment when used in the ordinary way for the purpose for which they were intended, it nevertheless extends to such other places as they are expressly or impliedly invited and permitted to use; and this includes rooms and places *properly* resorted by them incidentally to their employment, by virtue of such an invitation or permission, but not to places

[where] the employee goes for his own convenience and [or] where he is not expected to be.

"Ways. The master's duty to use ordinary care to furnish the servant with a reasonably safe place for his work is not restricted to the identical situs of the labor, but extends to the exercise of ordinary care to see that the means of egress and ingress and ways customarily used by *the* servant in passing from one part of the premises to another in the course of his employment are reasonably safe, since a place provided for employees in going to and from work is a place of work. . . . Where, however, the employer contracts to do work on the premises of another, it has been held that he is under a duty to see that the means of ingress and egress on such premises are kept reasonably safe, even though he has no control over such means so that he can directly remedy conditions therein, where he can compel the owner to do so or refuse to proceed with the work until the condition is remedied.

"Lights. The duty of the master to furnish the servant with a safe place of work includes the duty of furnishing sufficient light when *necessary* for the place of work, and this duty extends to passageways and stairways used by the servant in going to and from his work and from place to place in the course of his employment. A master, however, will not be guilty of negligence because of the absence of light where he has furnished a proper and complete equipment for lighting the place and has intrusted the turning on and off of the light, as an operative detail of the business, to a competent servant, nor will he be liable for the failure of the coemployees as between themselves to avail themselves of the means of lighting at hand. Liability for failure to furnish lights is not affected by the doctrine that the employer is not liable for injury resulting from a shifting character and condition of risk."

56 C.J.S. pp. 931-933; § 219 (b), (c).

9. "Now, the next thing has to do with the certificate of inspection which was introduced in evidence and as to which the trial court told the jury, 'No certificate of inspection may suffice for your duty.' Now, he had told the jury that its duty was to decide whether the defendant was or was not negligent. I contend that the certificate of inspection having been executed under oath by a duly constituted government official in the Coast Guard of the United States, taken in conjunction with the statutes which prescribe the specific duties which are involved in such an inspection, was enough *in and of itself,* particularly with the description of the extent and minuteness of these inspections as given by Captain Dyer, the marine superintendent of the appellant,—was enough in and of itself to permit the jury to infer that this particular part of this steamship was reasonably safe; and if the jury had been permitted to make such a finding, then, of course, it could also have found that the defendant, with knowledge of the requirements of the law and with knowledge of the fact that all of these inspections had been made not only in Portland and Seattle but all over the United States, and covered at least 45 of the exact same type of ship, the jury would at least have been entitled to infer that the defendant, in the exercise of ordinary care, and particularly in the exercise of that amount of foresight, not *hindsight,* but foresight, which the law requires to be exercised by an employer, was entitled to assume that this ship was in all respects at least reasonably safe, particularly when it was to be used by a so-called able seaman, and that it was entitled to *rely* upon that assumption unless there was *evidence,* direct or indirect, from which the jury could also have found that the defendant had *notice,* actual or constructive, to the contrary. Now that, I think, is a very important point in this case, and in that respect I call your Honors' attention to the late decision of the Supreme Court of the State of California

written by His Honor, Judge Spence, with the—and I say this in all kindness—usual dissent by Judge Carter—but in this decision the court says, 'it is an elementary principle that negligence is gauged by the ability to anticipate danger.' Then the court goes on to define what 'reasonable foresight' is and that it is essential to the concept of negligence." (Tr. pp. 16-17.)

Authorities: A. "While not conclusive on the question of negligence, the adoption by the master of the customary and approved means or tests for the discovery of defects in his machinery or appliances, will, as a rule, discharge his duty to his servants in that regard, and an injury sustained by a servant notwithstanding must be accepted as resulting from one of the risks of the occupation. However, a custom not to inspect will not relieve the employer of the duty to do so."

56 C.J.S. p. 998; § 240.

"An *official* inspection and test of the employer's place of work, machinery, or appliances by a public official or officials, pursuant to a statute providing therefor, do not *necessarily* relieve the employer from the duty, with respect [to] an employee, of making further tests. The fact that appliances or machinery have not been condemned, or that notice of defects therein has not been given to the employer, by a statutory inspector, is not conclusive on the question whether such machinery or appliances are safe and does not relieve the master from the duty of safeguarding such apparatus as required by statute, and the fact that a factory inspector has approved machinery or appliances does not relieve the employer from liability for negligence in respect thereof.

"A contractor who arranges with the owner of a ferryboat to transport his workmen to and from their place of work has been held entitled to rely on a certificate of the boat's seaworthiness provided by United States authorities

charged with the duty of inspection and responsible for the release of the vessel for service, *unless* notice of its unseaworthiness is brought home to the contractor."

56 C.J.S. p. 999; § 242.

B. "It is an elementary principle that negligence is gauged by the ability to anticipate danger. '[R]easonable foresight of harm is essential to the concept of negligence, and supplies the criterion for determining whether it exists in a particular case, and reasonable foreseeability of harm is the fundamental basis of the law of negligence. . . . On the other hand, one is not bound to foresee every *possible* injury which *might* occur, or every possible eventuality, but only those which were reasonably foreseeable; and one is not required to anticipate against dangers which it is not his duty to avoid.' (65 C.J.S. § 5c (2) (a), pp. 354-359.) This principle of foreseeable danger as the basis for liability underlies the doctrine of the leading case of *Palsgraf v. Long Island R. Co.,* 248 N.Y. 339 [162 N.E. 99, 59 A.L.R. 1253], where Justice Cardozo recognized actionable negligence as involved in proceeding at reckless speed through a crowded city street, but stated at page 100: 'If the same act were to be committed on a speedway or race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.' "

Tucker v. Lombardo, 47 Advance California Reports, 461, 468-469, 303 P.2d 1041, p. 1046.

10. "Now the next thing that I want to talk about is this evidence on the so-called custom to search a ship and the so-called custom of some, maybe two—no other number is mentioned; it just says, 'other ships'—this is Amundsen—he said he saw a screen over the top of the ventilator shaft which was surrounded by pipe railings. Captain Crawford said he had seen a heavy screen in place

of the pipe railings. Now, that is not evidence which amounts to a *general custom* or *general practice.* It is not evidence showing that steamship operators in the business customarily or ordinarily put screens there or have these other things there." (Tr. p. 18.)

Authority: Appellant joins with the appellee and is satisfied that one sentence in an authority cited by appellee sufficiently and completely covers this issue of law: "When the issue is one of negligence in the performance or failure to perform some act, it is clear that evidence of the *ordinary practice and custom* which is *generally followed* in the performance of such act under *the same or similar circumstances* is competent."

Burke v. Marshall, 42 C.A.2d 195, 203-204, 108 P.2d 738, 743; (Appellee's Brief, pp. 19-20).

11. "... in Corpus Juris Secundum it says on page 998, Section 240, 'The adoption of customary and generally approved methods of inspection or tests by an employer for the discovery of defects or dangers in his machinery, appliances or place of work is ordinarily held sufficient, but a custom not to inspect will not relieve the employer of the duty to do so.' That has reference to the evidentiary effect of that certificate of inspection which His Honor, Judge Tolin, told the jury would not suffice in and of itself for their performance of their duty, to wit, it wouldn't permit them to render a verdict in favor of the defendant." (Tr. pp. 18-19.)

Authorities: Supra, 56 C.J.S. p. 999, § 242.

12. ". . . there is a late case where a jury verdict in favor of a defendant in a F.E.L.A. case was reversed because of a half sentence, that half sentence having to do with this question of custom. The court told the jury that if the defendant acted in accordance with the ordinary practice, then the plaintiff couldn't recover; and the [Ap-

pellate] court thought that was bad enough to reverse the case, no matter what else the judge had said in his instructions." (Tr. p. 19.)

Authority: "The alleged error in the charge with respect to negligence is governed by somewhat different considerations. Defendant's counsel within the hearing of the jury requested the court to charge 'that as a matter of law it is not necessary for the defendant to provide the best or the newest and latest stairs or paint nor that the ship be accident proof. It is enough if the steps and paint provided *are commonly used and accepted in the industry at the time.*' The court replied: 'I will so charge.' Plaintiff remained silent throughout this colloquy, and the case was then submitted to the jury. . . .

"The trial judge charged the jury, at defendant's request, that 'it is enough if the steps and paint are commonly used and accepted in the industry at the time'. This instruction was erroneous. While the *customary* practice of *the industry* is relevant and admissible, the defendant's standard of care in a negligence action is not limited to complying with usual practice in the industry or trade. Wabash R. Co. v. McDaniels, 1883, 107 U.S. 454, 460-461, 2 S.Ct. 932, 27 L.Ed. 605; Poignant v. United States, 2 Cir., 1955, 225 F.2d 595; Uline Ice, Inc. v. Sullivan, 1950, 88 U.S.App.D.C. 104, 187 F.2d 82; The T. J. Hooper, 2 Cir., 1932, 60 F.2d 737.

"Consequently, plaintiff is entitled to a new trial on the issue of negligence as well as that of unseaworthiness."

Troupe v. Chicago, etc., Co., 234 F.2d 253, 259, 260.

13. ". . . Counsel for appellee has told your Honors that one of the instructions that I complained of and cited the case of Thompson v. Camp, amongst others, is not supported by the authority, and he quotes an excerpt from

the opinion. True it is, the court said what he quoted. Reading the instructions [in Thompson v. Camp] as they were given, your Honors will find that the trial judge told the jury all about the effect of knowledge and notice on the part of the injured man in spite of the fact that he [also had] told them that in the absence of notice to the contrary, he could assume thus and so. In our case there is no possible room for any assumption by Mr. Hutchison. He had actual notice of every condition in that mast house, according to their own uncontradicted evidence.

"Now, I offered counsel for the plaintiff and appellee a copy of these instructions which I had copied out of the Thompson v. Camp file, and he said he didn't want them, but I am going to give them to him anyhow, and if I may, I will give your Honors the original and two copies. It's a Chinese copy. Your Honors will find that some of it doesn't make sense. But the particular parts that are important do make sense." (Tr. pp. 19-20.)

[The particular portion of the instructions in the case of *Thompson v. Camp* to which I direct this Court's attention are contained in the typewritten copy of the instructions furnished to the Court at the time of the oral argument, from and including line 9, page 20 to and including line 9, page 23.]

14. "Now with respect to this question of whether or not pain and suffering after the sustaining of a personal injury is or could be a personal injury in the course of the employment, I would be less than honest with the Court, and less than honest to myself, if I didn't tell you about a decision which I found, a decision of the Supreme Court of the United States, in the case of Anderson v. Atchison, Topeka & Santa Fe Railway Company. That case arose in the courts of California. The contention of the administratrix in that case was that the deceased was

a railroad man, a conductor, and that he had disappeared from a moving train while it was at or near a certain station. There was no negligence alleged in respect of how he got off the train, none at all. [A careful examination of the *complaint* in the petition for a writ of certiorari, shows to the contrary.] But these railroad men knew he was off the train and knew the only place he could be, he either jumped or fell off, and that if he fell off, he might have been hurt. Anyhow, he fell off or got off in a place where it was freezing. So they went on, passed several stations, and nobody did anything until they got to a place called Yeso, New Mexico, and then a telegram was sent back to some other office, and the Complaint alleged that the other office waited an unreasonable time before telling anybody to go look for this man. And to make a long story short, when they finally found him, he had suffered such severe injuries or illnesses, or whatever you want to call it, from exposure to this freezing weather, that he died three days after he was found. Now, that is the case, as I say, of Anderson v. Atchison, Topeka & Santa Fe Railway Company, 333 U.S. 821, 92 L.Ed. 1108. But here is what I would like to have the Court consider: The Supreme Court didn't even mention in that case whether these freezing injuries were suffered while this man was actually in the course of his employment in interstate or foreign commerce. In other words, the question of whether he was or was not in the course of his employment at the time he was frozen was not suggested to the United States Supreme Court because it didn't say anything about it. Now, as I contend, the Constitution of the United States and the statutes enacted by the Congress are the supreme law of the land, and the statutes control, and if a court, even such a high court as the United States Supreme Court, overlooks a *pertinent* part of a statute, that decision is not precedent in respect of

the *complete* statute, and the court so held in the Jones Act case of [Pacific Steamship Company v. Peterson], supra." (Tr. pp. 22-23.)

Comment: The reason for the omission is clear from the Transcript of Record, Supreme Court of the United States, October Term, 1947, No. 620, *Anderson v. The A. T. & S. F. Ry. Co.,* on the petition for a writ of certiorari to the Supreme Court of the State of California. The complaint alleged, paragraph II, "that said defendant was at all times herein mentioned and now is engaged in the business of a common carrier by railroad in interstate commerce in the State of New Mexico, State of California, and other states. (Par. 2, 1st Cause of Action, Petition, p. 1.)

"That *at all times herein mentioned,* defendant was a common carrier by railroad engaged in interstate commerce and L. C. Bristow, deceased, was *employed* by defendant in *such* interstate commerce and *the injuries to deceased hereinafter complained of* and *which resulted in his death, arose in the course of and while deceased and defendant were engaged in the conduct of interstate commerce.*" (Par. III, Complaint, Petition, pp. 1-2.)

These allegations of paragraphs II and III were incorporated by reference thereto in the second cause of action, the one which was the subject of the opinion of the Supreme Court of the United States. (Petition, p. 3.)

In the answer filed by the railroad company paragraphs II and III of the plaintiff's first cause of action, hereinabove referred to, were *affirmatively* admitted. (Petition, p. 5.)

The same allegations, as incorporated in the second cause of action, paragraph I, second cause of action (Petition, p. 3) were *affirmatively* admitted by the defendant. (Par. XII, Petition, p. 6.)

This explains why the Supreme Court of the United States did not go into the subject which is involved in this particular point in the case at bar.

15. "Now, we get to the point where we have a disputed question of law. The Jones Act by its terms is restricted to personal injuries suffered in the course of the employment. No seaman can act in the course of his employment unless he has the physical qualifications which are required by the statutes and by the rules and regulations for licensing and certificating merchant marine personnel. Obviously, if your Honor is the master of a ship and you sign a man on foreign articles, and he has both legs cut off, that terminates the contract of employment, if that man is a seaman. He is no longer acting in the course of his employment because he cannot any longer perform any personal services." (Tr. p. 23.)

Authorities: A. Title 46 U.S.C., § 672, provides specifically for the division of the complete crew of a vessel into three separate and distinct departments, to wit: deck crew; engine department; and food-handlers. In respect of able seamen, the statute provides as follows: ". . . That upon examination under rules prescribed by the [Coast Guard] as to eyesight, hearing, and physical condition, and knowledge of the duties of seamanship, a person found competent may be rated as able seaman after having served on deck twelve months at sea or on the Great Lakes, . . . Application may be made to any board of local inspectors for a certificate of service as able seaman, and upon proof being made to said board by affidavit and examination, under rules approved by the Secretary of Commerce, showing the nationality and age of the applicant, the vessel or vessels on which he has had service, that he is skilled in the work usually performed by able seamen, and that he is entitled to such certificate under the provisions of this section, the board of local inspectors

shall issue to said applicant a certificate of service as able seaman, which shall be retained by him and be accepted as prima facie evidence of his rating as able seaman." (46 U.S.C., § 672.)

[The "Rules and Regulations for Licensing and Certificating of Merchant Marine Personnel" as contained in the bound booklet designated "C.G. 191" are, I believe, the same as those which were in effect on April 24, 1951, in respect of the matters and things pertinent to the issues in the case at bar.] The requirements in respect of physical and other matters are set forth in Section 12.05. 12.05-5(b) provides: "The medical examination for an able seaman is the same as for an original license as a deck officer as set forth in Section 10.02-5 of this subchapter. . . ."

10.02-5, referred to, supra, reads as follows: "All applicants for an original license shall be required to pass a physical examination given by a medical officer of the United States Public Health Service and present a certificate executed by this Public Health Service Officer, to the Officer in Charge, Marine Inspection. This certificate shall attest to the applicant's acuity of vision, color sense, and general physical condition. . . ."

B. "A contract of employment for personal services is *terminated* by the death of the servant, or where by reason of insanity, sickness, or other disability, or conviction of a felony he is not able to perform his contract, *unless* the parties have *contracted* to the contrary. . . . Illness of the employee, however, does not ipso facto breach the employment contract to such an extent as to terminate it. Whether it is terminated thereby depends on the facts of the particular case, the period of illness, its nature, the kind of service rendered, and other facts. Ordinarily the employment will not be regarded as terminated by the employee's illness *if* he is able to return

to his employment within a *reasonable* time or *if* the disability is *temporary* and does *not* in any substantial manner prevent performance on the part of the employee; but the protracted illness of an employee whose services are of *immediate* necessity, or are of such a *special* character that no ordinary person can perform them, so that it is necessary to obtain the services of a *skilled* person in order to continue the business, furnishes ground for the employer to declare the employment terminated. . . .

"Notice of termination. Where an employee has been sick for an appreciable length of time whereby he is unable to perform his duties it has been held not to be necessary to give notice of the termination of the contract, as in such case the right to terminate the employment does not depend on giving notice to the employee but on the fact that he has become unable to render the services on whose continuance the employment depends."

56 C.J.S. pp. 423-424; § 38.

16. "One other thing on this question of the search and failure to find, and so forth. There is no allegation in the Complaint, and there is no proof that any person who was an agent of the appellant had actual or constructive notice of the fact that this man was or could have been in this ventilator shaft. The master is the one who is the agent of the ship operator for the purpose of providing, not *specialists*, but ordinary medical care and attention, but only for such injury or illness as is suffered *in the service of the ship.* Now, when a man is lying in bed fatally ill with pneumonia, for example, or with both arms and both legs cut off, he certainly can't be acting in the course of his employment.[1] And therein lies

---

[1]"Before considering these questions, now acutely presented upon a meagre and inadequate record, we may state our opinion that a seaman 'falls sick, or is wounded,

one of the principal and substantial objections to this so-called search for and discover theory which was concocted, I say, for the purpose of prejudicing the jury against the defendant because lawyers who are careful enough to include averments of proximate causal connection between an alleged negligent omission and a personal injury and a death, are not going to [be permitted to] claim or contend, in my book, that when they [add] a paragraph at the end of the Complaint, 'By reason of the premises said Hutchison was damaged to the extent of $25,000,' that [that] is an averment of fact in accordance with the Federal Rules of Civil Procedure. Each averment in the Complaint must be simple, concise, and direct; not a conclusion but an averment of fact. And those averments of fact are entirely missing from the Complaint, and I have explained to your Honors why I think they left them out of the Complaint." (Tr. pp. 24-25.)

Authority: In respect of the question of agency,—2 Cal. Jur. 2d (Agency), pp. 855-866, §§ 160-166.

17. "There is one case that I just found. It is 221 Federal Reporter, p. 335. It answers one of the questions which we are asserting. In other words, here was a common carrier, a railroad which had tugs in New York Bay, and the court held that a seaman on a tug was entitled to sue under the Federal Employers' Liability Act, but only if the employer was engaging in interstate commerce at the time and the employee was employed in such

---

in the service of the ship,' if such misfortune attacks him *while* he is *attached* to the ship as part of her *crew*. It is not necessary that the wound or illness should be directly caused by some proven act of labor; it is enough that he was, *when incapacitated*, subject to the call of duty *as a seaman, and earning* wages, as such." (*The Bouker No. 2*, 241 F. 831, 833.)

commerce at the precise time of the sustaining of the injury. And that case I have Shepardized. It has never been overruled or criticized by any court, including State courts." (Tr. p. 25.) [*Erie R. Co. v. Jacobus,* 221 F. 335, 337-342.]

"Mr. Gallagher. Your Honors, counsel has brought up a couple of new things. . . .

"Mr. Gallagher. The point is this: Mr. Simpson, the head of the firm, conceded at the trial court in the trial that Mr. Amundesen was not talking about Victory ships when he said 'Other ships got screens here.' That is on pages 560, 561, and 562. (Tr. of Record.) A juror asked that specific question. And Mr. Simpson said, 'The reason I asked for the question is, it says, "On the shafts of other" '—and it is underlined—' "Victory ships." '

" 'The particular portion to which I referred in starting to answer this, to my knowledge, there is no testimony that they were seen on other Victory ships.

" 'The Court. It was on other ships? [Mr. Simpson] *That is correct.'*

"Now, No. 2, he told your Honors that you ruled in the first opinion that Paragraph IX of the Complaint stated a claim upon which relief could be granted. That was not even submitted to the court for decision. It is true, in your decision you mentioned the fact that a search was not made which resulted in finding him until the ship got to Philadelphia. But this court did not say that that was a cause of action, or that that would support a verdict, and, of course, I don't blame counsel for that.

"Now, the next thing is, he cites this Ziegler case and calls it to your Honors' attention. I want to call your Honors' attention to this, that this action for damages for death is based upon the second part of the Jones Act,

and that says that in any action maintained by the personal representative all statutes of the United States conferring or regulating the right of action in case of the death of a railway employee shall be applicable. Now, that makes it very clear. It says, 'All statutes which confer or regulate it,' and they confer it only against the common carrier and in favor of an employee who is employed in commerce.'' (Tr. pp. 26-27.)

ADDITIONAL AUTHORITIES ON INSUFFICIENCY OF THE EVIDENCE AND SPECULATION.

1. *Hawley v. Alaska Steamship Co.,* 236 F.2d 307.
2. *Atlantic Coast Line Rd. Co. v. Collins,* 235 F.2d 805, pet. for cert., by *Collins,* den. 1 L.Ed. 2d 238.

Respectfully submitted,

LASHER B. GALLAGHER,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix

The printed Transcript of Record (No. 5023, Fifth Circuit) contains testimony of Alden, as follows:

"I am a marine engineer and have been off and on since May 6, 1920. On or about the 13th of June, 1923 I shipped on the Steamship 'Keekoskee' for a trip from Pensacola, Florida to New Orleans and from New Orleans to Baton Rouge. The United States Shipping Board Emergency Fleet Corporation employed me to go on the voyage. I was employed in the capacity of pump man. On the morning of June 20th I had an accident in the engine room. Q. How did you happen to be in the engine room? A. I was told to overhaul the pumps in the pump room by the Chief Engineer, and in order to overhaul them and to see that they were in working condition, we had to have lights, and I *got orders to go into the engine room* and start the generator. Q. Was it necessary for you to start the generator in order for you to have lights for the overhauling of the pumps? A. Yes, sir. Q. Did anyone go to the engine room with you? A. Yes, sir, the Assistant Engineer, William E. Brown and Carl Anderson. Q. Who was the one that was ordered to *start the generator,* you, or Brown or Anderson? A. Well, Brown was the one that was ordered to *start* it; he was employed in the capacity of Assistant Engineer. Q. *You and Anderson* went down to give him any assistance that might be *necessary?* A. Yes, sir. Q. When you all got down to the engine room on that occasion, tell us just what happened? A. We started the generator. Q. Who started it? A. And immediately after that why the steam came out from under the inspection plate. Q. How many minutes or seconds was it before the steam came out from under the inspection plate? A. Possibly five or ten minutes." (Alden, Tr. of R., pp. 13-14.)

"Q. His duties relate to the care of the operation of the pumps? A. Yes, sir; and also to any other work that the Chief Engineer may deem necessary to perform from time to time." (Alden, Tr. of R., p. 23.)

"Q. As I understand it, here is what happened; you were asked by the Chief Engineer to fix the pumps? A. Yes, sir. Q. And you advised the Chief Engineer at that time you would need lights down there in order to give you the opoprtunity of seeing what you were doing? A. Yes, sir. Q. And after you advised the Chief Engineer of that fact, he then instructed Brown and Anderson to go down with you to start the generator, so that you could get lights to do your work on the pumps, is that right? A. He did not instruct me to go into the engine room to *start the generator,* no. Q. He told Brown and Anderson *to go down there with you?* A. *Yes, sir.* Q. And told *them* to go and *start* the generator, so that you could have lights for your work on the pumps? A. Yes, sir. Q. That is *the reason for all three of you* going down there? A. Yes, sir." (Alden, Tr. of R., p. 25.)

"Q. You say that within ten or fifteen minutes after the generator was turned on, and while you were *all* still down in the engine room, this steam escaped from under the inspection plate? A. Yes, sir. Q. Had you fixed the pumps? A. No, sir, I had not left the engine room yet. Q. The lights had not gone on? A. The lights were on, but I had not left the engine room yet. Q. You still stayed around the engine room? A. Yes sir. Q. What was your purpose for lingering in the engine room? A. *I was just staying there to see that they got everything all right* and *then go down in the pump room.* Q. Had they finished *starting* the generator? A. Yes. Q. What was your reason for staying around in the engine room? A. Well, there was no reason at all, so far as I can see, except on that work we were over by

it, that is all. Q. What were you doing over by it, that is what I am trying to get at? A. Well, I *went over there to look to see that everything was all right.* Q. What were you looking at? Did you go there to inspect the *generator?* A. No, but looking *everything* over to see that *everything* was *alright.* (sic)'' (Transcript of Record, United States Circuit Court of Appeals, Fifth Circuit, No. 5023, *Alden v. U. S. Shipping Board, E.F.C. and S.S. ''Keekoskee'',* pp. 12-29.)